Filed 2/22/10 In re M.W. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re M.W. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. A.W., Defendant and Appellant.	G042577 (Super. Ct. Nos. DP008429, DP011764) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Caryl A. Lee, Judge. Affirmed.

Gerard McCusker, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Julie J. Agin Deputy County Counsel for Plaintiff and Respondent.

No appearance for the Minors.

* * *

The juvenile court did not err in denying a hearing on the mother's petition under Welfare and Institutions Code section 388. (All further statutory references are to the Welfare and Institutions Code.) Nor did the court err not finding the parental benefit exception under section 366.26, subdivision (c)(1)(B)(i) applied here. We affirm.

I

FACTS

M.W. was born in 1999. His sister, A.W., was born in 2004. The petition alleges a failure to protect and includes the following supporting facts: "On October 23, 2008, the children's mother drove a car with her blood alcohol level of 0.18, while the children [M.W.] and [A.W.] were in the vehicle. Additionally, the children's mother crashed into two other vehicles, placing the children's physical safety and well being at risk for injury or death." The petition goes on to allege the mother failed to have the children assessed for possible injuries, and instead took them directly to school; the mother has an unresolved substance abuse history; the mother has participated in voluntary family services, family reunification services, family maintenance services as well as other services since 1994, but continues to make decisions that place the children at risk; the children's father has a history of substance abuse and his whereabouts are unknown; the two children as well as an older sibling who has a different father were declared dependent children in 2005 because of sustained physical abuse by the mother; On October 28, the court found a prima facie showing under section 319. On December 17, 2008, the court found the allegations true.

The Orange County Social Services Agency (SSA) reported it has had contact regarding the family nine times since 1994. The agency informed the court the mother has had eight contacts with law enforcement concerning controlled substances, corporal injury on a spouse, child cruelty, disorderly conduct and intoxication.

On June 21, 2009, the juvenile court, pursuant to section 361.5, subdivision (b)(13), ruled that reunification services need not be provided to mother. The court set a hearing under section 366.26. The mother filed a motion under section 388.

SSA reported to the court on June 18, 2009 that "the mother has not fully dealt with her alcohol and/or drug prescription medication addiction . . . ." On June 24, SSA reported that the prospective adoptive parents have "dealt with infertility and come to terms with the fact that they are not having biological children. They feel blessed that their family was meant to grow through adoption." They have already taken the children for dental appointments and eye examinations and have scheduled appointments for medical examinations and therapy. SSA reported to the court that they "have done a wonderful job of completing the necessary tasks regarding the children's medical and emotional needs, as well as doing fun family activities to promote bonding." SSA recommended the court find there is clear and convincing evidence that it is likely the children will be adopted and terminate parental rights.

On August 5, 2009, the court determined there would be no hearing on the mother's motion under section 388. On August 6, the court terminated parental rights and ordered that the children be placed for adoption.

II

DISCUSSION

Section 388 Petition

Mother contends the juvenile court abused its discretion by summarily denying her section 388 petition. We apply the abuse of discretion standard in our review of the juvenile court's decision to deny the section 388 petition without a hearing. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.) We may not reweigh the evidence or substitute our judgment for that of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 319.) We affirm the order unless it "'"exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing

court has no authority to substitute its decision for that of the trial court." [Citations.]' [Citations.]" (*In re Brittany K., supra,* 127 Cal.App.4th at p. 1505.) The juvenile court's decision will not be disturbed unless the court "'"has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]."' [Citations.]" (*In re Stephanie M., supra,* 7 Cal.4th at p. 318.)

"The parent seeking modification [through a section 388 petition] must 'make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]' [Citations.] There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.] If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing. [Citation.]" (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

With a lengthy explanation which demonstrated the court's familiarity with the family, the juvenile court concluded the mother failed to satisfy either prong of the prima facie test, and denied the section 388 petition without an evidentiary hearing: "It would be an understatement for this court to say that this is a sad, regrettable situation that we do have. This decision in review of the mother's request is probably one of the more difficult decisions that I have ever had to make in 15 years, and I will up front indicate that this court has had mother in her court for at least three years with the DDC program, the dependency drug court program, and absolutely acknowledge that she was always very well liked and is well liked. Her children, her oldest daughter was very familiar to the court, and her case has been terminated and is not before the court at this time. But I say this because there is a sympathy for her, at this stage this court needs to focus on these children. I do sympathize with this traumatic situation, but I have children that I need to look at. [¶] The idea of changed circumstances, this court cannot, even

though a liberal construction is required, find that the circumstances have changed. We have, I agree, about a 20-year history of substance abuse, and we have the milestones that are the most recent, June of this year, which is about a month and a half ago or a month ago, a graduation from perinatal again and the [driving under the influence] DUI course, the three-month course that was required from her DUI. [¶] Mother's position has been presented as I have a different motivation this time. It is the same motivation as before and before. When the second dependency case was filed the children had been removed, and that's usually a big eye-opener. When your children are removed you generally consider that to be the ultimate motivation. And what this court recalls that was the motivation for mother to work through the DDC program. I absolutely agree with the characterization that she was a star. She was a DDC star. I did not have the privilege of having the case from the beginning for the DDC program. I came on when mother was well into the program but was doing incredible, and as I recall doing [alcoholics anonymous] AA and [narcotics anonymous] NA as well. So the addition of those as a changed circumstance is really not a changed circumstance. The frequency may be more but the component of DDC required participation in the 12-steps, and those cards were checked each week. So I realize that that was something that was already done. [¶] The DUI was, to say the least, conservatively, unfortunate. Mother had been in the system for quite a while and you could characterize it as enjoying the supervision and the comfort and the structure that is provided by the court supervision as well as the agency supervision. Unfortunately when that supervision ended and it appeared that things were well-addressed, this October 2008 DUI occurs. This is what I characterize as a non-garden variety DUI. A garden variety DUI is officer pulls you over for erratic driving, smells alcohol, bloodshot watery eyes, failing an [field sobriety test] FST, no collision, and the person is arrested and there it is. That's your garden variety DUI. [¶] This, however, is not the case. This DUI involved mother driving with a .18 having to be hospitalized, and there was a difficulty in getting a response from her, the children were

in the car, and I believe that two other vehicles were hit in the course of this and that apparently there was a hit and run component. I will admit that I don't know the ultimate disposition in that is it a 23153, a felony with injuries, is it a hit and run, I don't know what actually was charged or ultimately what was pled to. I know that there is a five-year formal probation which would be consistent with the scenario that went down here. I do recall seeing mother afterwards and being very distressed at her appearance with a cervical collar and bruises and appearing to be in a lot of pain. [¶] So this was, once again, not a garden variety DUI, and this I agree is a near-death experience for mother and the children. To make the decision to drive while intoxicated is one thing but to put the kids in the car is just a whole different discussion that has to be had. And it is twice the legal limit and there was also a comment made in a previous report — and I'm making this comment because I'm underlying the seriousness of the problem. I'm not trying to pound an issue home that doesn't need to be pounded, but the focus of this problem is the seriousness of it. This is a very, very, very serious problem that we have. [¶] . . . [¶] If I was to reach the best interest argument, I do not believe it is in the best interest for these children to have this tumultuous lifestyle continue, in court, out of court, have mom put them in the car and drink and drive and nearly kill them and having them pulled from one placement to another and now returning them home and who knows what, I simply cannot believe that that is supporting their best interest. These children are four and nine and they have — at least mother has been in the system since 1994. So well before these children were born have they been exposed to this serious behavior. [¶] . . . [¶] They deserve to have permanency without this type of tumultuous lifestyle. The court cannot grant mother a hearing, and the 388 petition is denied."

Here the mother has been given numerous opportunities to change her ways, but time and again, she did not do so. The court recognized she had a period of sobriety, but placed little import in that fact because of her extensive past history of continuing to abuse alcohol and drugs after periods of sobriety. The court noted the

mother has been given the opportunity to participate in programs since 1994. Despite these advantages, she nevertheless drove the minor and his sibling in her car while her blood alcohol was more than twice the legal limit. She did not make a prima facie showing of either changed circumstances or that a different order would be in the best interests of M.W and A.W. Under the state of affairs in this record, we cannot conclude the juvenile court abused its discretion in declining a hearing for the mother's petition under section 388.

Parental Benefit Exception

The mother next contends the court erred in declining to apply the parental benefit exception. She says the court's finding is not supported by substantial evidence. We note the mother waived her right to a section 366.26 hearing.

"When the juvenile court finds that the child is adoptable, it must terminate parental rights unless it finds one of four specified circumstances in which termination would be detrimental." (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 852.) Under the parental benefit exception, the juvenile court may decline to terminate parental rights if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

The parent bears the burden of proving termination of parental rights would greatly harm the child. (*In re Brittany C., supra,* 76 Cal.App.4th at p. 853.) "[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

The parent must show he or she has a parent-child relationship: "[T]he child's relationship must transcend the kind of relationship the child would enjoy with another relative or family friend." (*In re Jeremy S.* (2001) 89 Cal.App.4th 514, 523, disapproved on another ground in *In re Zeth S.* (2003) 31 Cal.4th 396.) "Thus, a child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent. It would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*).)

In *Jasmine D., supra,* 78 Cal.App.4th at page 1351, the court concluded the abuse of discretion standard of review governs a decision applying the parental benefit exception, but noted courts "have routinely applied the substantial evidence test" to the juvenile court's findings. As the *Jasmine D.* court explained, "[t]he practical differences between the two standards of review are not significant" because "'[e]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling . . . .'" (*Ibid.*) Here, mother only challenges the sufficiency of the evidence to support the juvenile court's finding the parental benefit exception did not apply; she does not argue the finding resulted from a misinterpretation of the law or was otherwise an abuse of discretion.

In reviewing the sufficiency of the evidence, "[w]e determine whether there is substantial evidence to support the trial court's ruling by reviewing the evidence most favorably to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the court's ruling." (*In re S.B.* (2008) 164 Cal.App.4th 289, 297.)

"The parent has the burden of proving that termination would be detrimental to the child under section 366.26, subdivision (c)(1)(A)." (*In re Jasmine D., supra,* 78 Cal.App.4th at p. 1350.) But the mother produced no evidence at all. SSA reported to the court: "In regards to the children, [M.W.] and [A.W.]: The family

received family reunification services from May 20, 2005 to December 19, 2005 and family maintenance services from December 19, 2005 to June 28, 2006." With regard to their older sibling, family services were provided throughout 2006, 2007 and into February 2008. Less than eight months after the services stopped, mother was responsible for injuries to the children when she drove them in her car while she was drunk.

We find much more than substantial evidence in this record to support the juvenile court's orders and rulings. The mother has not met her burden of showing it would be detrimental for M.W. and A.W. to get off this physical and emotional roller coaster.

III

DISPOSITION

The juvenile court's orders are affirmed.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.